NAB believes that the Commission, in the Report and Order, struck the appropriate balance between its intention to "avoid any de facto system of 'precensorship' and to leave the licensee to 'interpret the program categories in good faith"[41] and the Congressional-intended deference to the "reasonable programming judgments of licensees"[42] on the one hand and the perceived need to provide some "guidance to the industry as well as to Commission staff administering the statute"[43] on the other. As the Commission said, a general definition as was adopted gives "licensees sufficient flexibility to exercise their discretion in serving children's needs."[44]

B. The Congressional Definition Is Clear and Is Working.

NAB submits that the vast majority of broadcasters understand and properly apply the Congressional definition of programs responsive to the Children's Television Act. Given the guidance in the legislative history and the Report and Order as to the definition of "qualifying" programming, broadcasters have no problem making the "reasonable programming judgments" as to what programming can serve to satisfy their "core" programming obligation, as opposed to programming that may contribute something of value to children, but that does not serve this "core" function. And, NAB submits, broadcasters know very well what mix of programming they are presenting in satisfaction of their obligation under the Act. Licensees would be foolhardy not to know. They would be foolhardy to *rely on* mischaracterized unresponsive entertainment programming for satisfaction of their "core" obligation.

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[41] Notice, supra note 22, at ¶ 8, citing National Association of Independent Television Producers and Distributers v. FCC, 516 F.2d 526, 540 (2d Cir. 1975).

[42] Remarks of Sen. Inouye, supra note 19.

[43] Report and Order supra note 23, at ¶ 19.

[44] Id.

With regard to the instant Notice's concerns that "many licensees do not clearly distinguish between the general audience/entertainment programs they have shown that serve children's needs and the programs they have aired that were specifically designed to educate and inform children," NAB suggests that, if some licensees do not adequately separate their program listings for purposes of easy analysis, this can be remedied by the Commission's requiring a specific *form* of reporting.

And with regard to the concerns expressed and implicit in the instant Notice that some licensees make mischaracterizations as to "educational and informational" versus entertainment or as to "specifically designed for children" versus general family, NAB believes that the Commission's concerns can be met, rather than by redefining and further defining a working definition, by the Commission's being clear as to the form of programming categories it believes is necessary for adequate review and announcing its intention to require any licensee appearing to rely on improper characterization of programming in satisfaction of its obligation to substantiate its judgment in this regard.[45]

NAB submits that, while different people and groups will make somewhat different classifications[46] as to whether particular programming is "educational or informational" under the Congressional definition, and thus different broadcasters will classify programs somewhat differently, broadcasters' "reasonable programming judgments" are what was intended by Congress, that they are really not so difficult to make and they are producing a significant amount of "educational and

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[45] See Report and Order, supra note 23, at ¶ 26, where the Commission states that, where such program determinations are in doubt, it will expect licensees to substantiate their determinations. Quite clearly, the entire television industry should not bear the burden of retraining staff to follow "new" government regulations rather than an understood working definition because a few could not follow clear instructions as to program classification and characterization.

[46] See Lynn O'Brien, Ph.D., "Educational and Informational Children's Television Programming An Examination of Current Research," (July 25, 1995) (unpublished research study, filed in MM Docket No. 93-48)("O'Brien Study"), attached here as Attachment 4.

informational" programming by most any standards. Again, if the Commission perceives a problem in the way responsive programming (both "core" and "contributing") is being listed in renewal applications, it may want to prescribe a specific reporting form and program classifications for its ease of review at renewal time.

C. Television Appropriately Serves Children's "Educational and Informational Needs" With A Wide Variety of Types of Programming.

As Senator Inouye clearly indicated in presenting the Children's Television Act to the Senate on behalf of the Commerce Committee, Congress did not intend for "qualifying" programming to be "academic" or "instructional" or even that it need be "intellectual."[47] Congress intended, rather, that serving children's educational and informational needs pursuant to the Act include "not only intellectual development, but also the child's emotional and social development."[48] Thus the current definition is in keeping with Congressional intent by defining qualifying programming as that which "furthers the positive development" of the child in any respect including the child's "cognitive/intellectual or emotional/social needs."[49]

NAB submits that Congress got the definition right, that children "learn" from a broad range of types of programming, that "learning" encompasses much more than academic subjects and that children themselves consider a broad range of programming as "educational and informational." These points are demonstrated in the accompanying study of children's learning and television, commissioned

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[47] Remarks of Sen. Inouye, supra note 19, at 10122

[48] Id.

[49] 47 C.F.R. §73.671 Note.

by NAB, by Dr. Lynn O'Brien, a Ph.D. in education, with a specialty in children's learning and television .[50]

For this study, Dr. O'Brien conducted focus groups with educators and with four different-aged groups of children, talking with them about "educational and informational" programming on television. In her paper, she discusses what constitutes educational and informational "learning" from television in the context of current educational brain-based learning theory, referencing throughout her paper the opinions of the educators and various aged children from the focus groups. Dr. O'Brien concludes that:

- from the perspective of brain-based research, children learn a great deal from television because it satisfies and stimulates their need for fun, humor, relaxation, creativity, curiosity and their innate search for meaning and problem solving[51]
- children learn incidentally and many things qualify as learning[52]
- what constitutes "educational and informational" needs to be broad-based[53]
- social and emotional "behavioral" characteristics, included on school report cards, can be "learned" from a wide range of television programming[54]
- television facilitates "learning" by encouraging creativity, curiosity and problem-solving[55]
- "learning" goes way beyond the traditional too-narrow conception of what's "educational"[56]

D. The Proposed Definition Is More Restrictive and Burdensome Than the Congressional Definition and Eliminates Incentives to Present Valuable Educational and Informational Programming.

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[50] See O'Brien Study, supra note 45.

[51] Id. at 1.

[52] Id. at 12-13.

[53] Id. at 9-10.

[54] Id. at 4.

[55] Id. at 6-7.

[56] Id. at 5.

NAB, as stated above, believes that the current definition provides broadcasters with sufficient guidance regarding the definition of the programming responsive to the Act. If anything, the lack of a reporting form may not have made broadcasters' listings easily susceptible of evaluation, and perhaps this listing issue should be addressed by the Commission. NAB submits there is no need to add a more "particularized" definition to government rules.

NAB also here comments on the particulars of the Commission's proposed definition. One, NAB believes that the Act intended to encourage programming that in effect serves children's educational and informational needs, whether or not there was an "active" significant "purpose to educate." Pursuant to the Commission's proposal, the broadcaster would be charged with obtaining verification of the producer's intent of every "core" program, unless the program was of an obvious academic bent, which clearly was not a limiting factor intended by the Congress.

In addition, NAB expresses its concern that the Commission's proposal to require "education as a 'significant purpose" smacks of "academic," "instructional" and "education" in a more traditional sense, and in fact drops the "and informational" out completely. As NAB discusses above, "education" in the curriculum-sense is clearly not what Congress had in mind,[57] nor is it what new research thinking or children see as "educational and informational" programming.[58]

Moreover, NAB believes that the current definition does in fact define "specifically designed educational and informational programming," contrary to a suggestion in the instant Notice. In the words of Senator Wirth, one of the drafting authors of the "specifically designed" provision,[59] the

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[57] Remarks of Sen. Inouye, supra note 19, at 10122.

[58] See O'Brien Study, supra note 45, at 12-13.

[59] The "specifically designed" provision was added to the previous House version of the bill that required broadcasters only to serve the educational and informational needs of children in their overall programming. See Remarks of Senator Wirth, supra note 25, at S10123.

obligation is to provide "some educational and informational programming *targeted specifically at children.*"[60] That is, "specifically designed" throughout the legislative history is spoken of as "specifically designed for children," as opposed to educational and informational programming not designed for children but rather for a general audience.[61] General audience programming may be highly "educational or informational" and thus contribute to the "positive development of the child" but it is not specifically designed for children and thus not "core" programming.[62]

Two, as to the instant Notice's proposal that licensees specify in writing the "educational" objective of each core program, as well as its target child audience, NAB believes that this is a significant paperwork burden on stations, and is not needed to help them satisfy their obligations under the statute. And NAB suggests that this would not be of such beneficial use to parents wishing to comment to the broadcaster about children's programming to justify the added burdens on broadcasters. Similarly NAB suggests that it is reasonably obvious what the target audience of children's shows are, and that the paperwork burdens involved do not justify the asserted benefit.

NAB agrees with the Commission's view that it is not desirable to mandate age-specific programming. NAB notes that the legislative history is crystal clear that age specific programming was *not* contemplated by Congress.

Three, NAB is generally opposed to the Commission's requiring that core programming be aired at any specific time. We do not however oppose the Commission's reasonable approach of

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[60] Id. at S10127.

[61] See eg., Remarks of Sen. Inouye, supra note 19, at S10122; Remarks of Sen. Wirth, supra note 25, at 10123.

[62] See Remarks of Sen. Wirth, supra note 25, at S10123 for this point. Thus NAB disagrees with the contention in the Notice at ¶ 27 that the Commission's definition "makes no distinction between general audience/entertainment programs and programs that are specifically designed to educate and inform."

routinely "counting" core programming aired during the hours of 6AM to 11PM. But we would suggest that this time be adjusted for the central and mountain time zones, where the morning adult news shows begin an hour earlier that in the other time zones. We also suggest that the Commission permit stations to show a significant audience at an earlier hour and thus claim "credit" for such broadcasts.

NAB notes that the vast majority of "core" programs are being aired within the times the Commission has proposed in the instant Notice as "eligible" times, i.e., 6AM to 11 PM. The recent NAB Survey shows that in fall 1994 97.2 % of specifically-designed educational and informational programming aired after 6 AM, with 81.4% airing after 7AM.[63] As NAB has previously pointed out, while the vast majority of shows air after 7AM, it is not inappropriate that some educational and informational shows are aired and available to children at even earlier times, particularly before the morning adult news programs begin. Great numbers of children are up and watching television very early in the morning, particularly younger children, and it is appropriate that they can view educational and informational programming then, as well as at other times.

In fact, as seen in Attachment 5 to these comments,[64] at 6AM there are approximately 1.2 million children age 2-11 watching television Monday-Friday, which is 3.1% *of all children*. At 6:30 AM, there are approximately 2.6 million children age 2-11 watching television Monday-Friday, which is 6.7% of all children. In comparison, the *largest* daytime children's audience for the entire week is 9:30AM on Saturday morning when only 28.24.6% *of all children* are watching. Thus, depending on a station's other children's programs and other programming constraints (notably general news and information programs), a 6AM or 6:30AM time slot may be appropriate *and* serve a child audience

[63] See 1995 NAB Survey, supra note 7, at 11-12.

[64] Kids 2-11 Television Viewing, Nielsen Peoplemeters, in the 4th Quarter 1994, here attached as Attachment 5.

with educational programming *before* family viewing of morning news shows occupies the television set. And, as stated above, over 81% of educational fare airs after 7:00AM.

Four and five, NAB objects to the Commission's proposal to not "count" short segments or specials as specifically designed educational and informational "core" programming. If that were done, NAB would fear that this valuable type of programming might be discounted by both broadcasters and the Commission. Rather, as is noted in the Report and Order,[65] short segment programming is well suited to children's short attention spans and can often be locally produced with acceptable production quality and thus "may be a particularly appropriate way for a local broadcaster to respond to specific children's concerns."[66] Short segments also can be effective in reinforcing particular messages and, when placed in or adjacent to popular entertainment shows, can reach large numbers of children. NAB suggests that this important form not be discounted by the Commission or broadcasters, but rather be encouraged.

Similarly, NAB urges the Commission to continue to count as "core" programming children's educational and informational specials, which, as their name implies are "special" and thus most likely are particularly produced with children's "educational and informational needs" in mind and thus of real value for kids. NAB suggests that this is an area where particular program suppliers, specifically the networks, can continue to serve children in a special way that should not be discouraged.

Six, NAB objects to a government rule *requiring* media to attach on on-air "labels" to programming or to furnish specific listings to program guides. NAB opposes these proposals in principle, believing it is beyond the prerogative of government to force such markings or listings. But

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[65] Report and Order, supra, at ¶ 25. See also Memorandum Opinion and Order in MM Docket No. 90-570, 6 FCC Rcd 5093 (1991) at 42.

[66] Id. at ¶ 25.

on a more practical level, on-air "educational" icons are most likely a way to discourage children's viewing of these programs, irrespective of the creative attempts of the program producers to package educational and informational shows with appealing titles, formats, and styles. And specially marked program listings can function in the same negative way for older children reviewing the program guides and will undoubtedly involve a substantial degree of paperwork for stations. Rather, NAB suggests that the FCC attempt to encourage the use of program listings, but not require them under force of rule.

Finally, NAB comments on the "permissive guidelines" for "assessing community needs" discussed in the instant Notice at ¶ 44. NAB believes that such guidelines can and should remain as a reference for stations as to their considerations in determining what programming to present. These guidelines are of course a statement of factors that most broadcasters would look at in making any programming decision, but having such considerations as a reference could in some circumstances be useful.

V. The Commission's Proposed Rules Would Violate the First Amendment.

In the Notice, the Commission proposes to adopt a new and restrictive definition of programming that serves the "educational and informational needs of children," and to impose either a processing guideline (under which licensees which programmed a specific amount of programming meeting that definition would be deemed to have met their obligations under the CTA,) or a rule requiring the airing of a specified amount of such programming. These proposals are extraordinary -- never in the 61 years since the passage of the Communications Act of 1934 has the Commission required licensees to air specific amounts of programming that fall within a precise government

definition.[67] In the Notice, the Commission quite appropriately recognizes that there is a serious question about the Commission's power under the First Amendment to adopt such rules. Since the Commission adopted the Notice, however, Chairman Hundt has argued in several speeches that the Commission would be permitted, under the First Amendment, to adopt the proposed rules.[68]

Because this unprecedented extension of the Commission's power over the content of the programs on broadcast stations does raise exceptionally broad questions under the First Amendment, NAB asked Professor Rodney A. Smolla of the Institute of Bill of Rights Law at the Law School of The College of William and Mary to analyze the Commission's proposals and the arguments raised by the Chairman in light of the established First Amendment principles governing regulation of broadcasting. Professor Smolla is a noted First Amendment scholar.[69] Indeed, the Commission has in the past relied on Professor Smolla's views in assessing regulatory alternatives. See Implementation of Section 4(g) of the Cable Act of 1992 (Home Shopping Issues), 8 FCC Rcd. 5321, 5328-29 (1993).

Professor Smolla's statement is attached as Attachment 6. He concludes that the adoption of either the proposed processing guidelines or the mandatory programming standard, together with the proposed new definition of qualifying programming, would violate the First Amendment. It should be carefully noted that Professor Smolla reaches this conclusion based on an analysis of the cases that

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[67] Although the Commission at one time utilized programming processing guidelines in assessing television renewal applications, those guidelines were general in nature and the definitions of the programming that would meet the requirements were quite broad. That contrasts with the very detailed programming requirements that would be placed on licensees by the present proposals. It is also worth noting that the Commission ultimately concluded, in part based on First Amendment concerns, that the public interest did not support even those very general programming guidelines. See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC 2d 1076 (1984), aff'd in part and rev'd in part on other grounds sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

[68] See, e.g., Chairman Reed E. Hundt, "A New Paradigm for Broadcast Regulation," Conference for the Second Century of the University of Pittsburgh School of Law (Sept. 21, 1995); Chairman Reed E. Hundt, "Long Live Frieda Hennock," Women in Government Relations (Aug. 24, 1995).

[69] Professor Smolla's credentials and extensive publications in the First Amendment area are described at pages 1-2 of his Statement.

have permitted some abridgment in broadcast regulation of the normal First Amendment standards. He notes (Statement at 7 n.5) that the teachings of Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) and its progeny have indeed come under increasing criticism, but his analysis assumes (for purposes of analysis) their continuing validity. Of course, were Red Lion overruled or narrowed and broadcast regulation judged under the First Amendment standards applicable to all other media, the conclusion that the Commission's proposed rules run afoul of the First Amendment would be even more compelling.

Professor Smolla first examines the Commission's proffered justification for imposing government speech requirements on broadcasters. In the Notice (¶ 53), the Commission suggests that new regulations are needed because it appears that the workings of the marketplace have not produced a desired amount of educational and informational programming for children. A marketplace failure, however, even if it were proven to exist, cannot support the abridgment of broadcasters' First Amendment freedoms.

Professor Smolla points out (Statement at 5-6) that in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), the Solicitor General argued that the holding in Red Lion should be viewed as based on a finding of "market dysfunction." The Supreme Court directly rejected this argument, holding that its broadcast jurisprudence was grounded solely in spectrum scarcity -- "the special physical characteristics of broadcast transmissions." Id. at 2457. The Constitution does not permit the government to dictate speech based on a perceived market failure. Thus, Professor Smolla concludes that "the Commission's entire agenda in these proceedings is grounded in a purpose that the Constitution does not allow it to entertain." Statement at 6.

Professor Smolla next considers whether the proposed children's programming regulations could be sustained under the Red Lion spectrum scarcity rationale. The Supreme Court's broadcast cases have permitted a *limited* intrusion into licensees' editorial discretion to ensure balance in the presentation of views on issues of public controversy. Nothing in the Red Lion cases has permitted the Commission to impose specific affirmative programming obligations on licensees to advance views of the government's choosing. Indeed, the Supreme Court has stressed to the contrary that "broadcasters are engaged in a vital and independent form of communicative activity." FCC v. League of Women Voters of California, 468 U.S. 364, 378 (1984). The government's interest in ensuring presentation of a diversity of viewpoints does not, the Court has held, "impair the discretion of broadcasters . . . to carry any particular type of programming." CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981). The Commission's proposals in this proceeding thus find no support in the cases that have upheld very restricted regulation of broadcast speech.

Moreover, Smolla recognizes (Statement at 8) that, under the proposed rules, the Commission would ineluctably be forced to undertake program-by-program review of broadcasters' children's programming to determine whether it fell within the definition. "Specific programming requirements are senseless without specific regulatory enforcement." Review of individual programs by a government agency would, he stresses, be "at odds with statutory limitations, prior Commission practice, and core First Amendment principles." Id. at 8-9. It is difficult to imagine a process more fundamentally at odds with the First Amendment than review by the Commission of the adequacy of particular broadcast programs. Yet, that would be the precise result of the proposed rules.

Had there been any doubt that the Commission's proposals could not be sustained under the Supreme Court's broadcast jurisprudence, Professor Smolla points out (Id. at 10-14) that the Court's

recent opinion in Turner Broadcasting explicitly concluded that the Commission does *not* have the authority to impose particular programming obligations. Reviewing its broadcast First Amendment decisions, the Court stated:

> "In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although 'the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.'"[70]

Thus, in the Court's most recent explanation of its broadcast jurisprudence, it categorically rejected the notion that the Commission had the authority to do what it proposes to do here — define a particular type of programming that broadcasters must air. Smolla finds no support, therefore, for the Commission's children's television proposals in the Supreme Court's broadcast cases.

He then examines the proposals under traditional First Amendment standards. Professor Smolla points out that at the core of the First Amendment is the principle that speakers have the right to choose what to say and what not to say. Just this year, the Supreme Court again squarely rejected arguments that private speakers could be required to express ideas approved by the government:

> "The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2338, 2350 (1995). Thus, even though providing increased educational resources for children may be an important government objective, the Commission cannot seek to achieve it by dictating the speech of private broadcasters.

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[70] 114 S. Ct. at 2463, quoting Network Programming Inquiry, 25 Fed. Reg. 7293 (1960).

In this connection, Professor Smolla considers (Statement at 14-15) recent comments by Chairman Hundt in which he argued that First Amendment principles *support* the Commission's adoption of specific programming requirements, claiming that they would be less intrusive than the general programming obligations imposed to date under the CTA. The Chairman's argument, Smolla concludes, "turns existing First Amendment doctrine upside down." Id. at 14. While laws that *restrict* speech must be precisely tailored, there is no opposite requirement that the government adopt specific rules when it seeks to *mandate* speech. "The premise of the Chairman's remarks is thus profoundly flawed; the precision principle, designed to protect speakers from government overreaching, cannot be invoked to aid and abet it." Id. at 15.

Moreover, the Commission cannot base affirmative programming obligations on cases that recognized the government's interest in protecting children from harmful speech. While the Court in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), upheld rules that barred certain speech during times when children were likely to be in the audience, Smolla notes that Pacifica "provides no support for affirmative requirements imposing on broadcasters actual obligations to attempt to reach children with certain defined types of programming." Statement at 18. Similarly, the decisions in Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir.), pet. for cert. filed, U.S. No. 95-520 (Sept. 28, 1995), and Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir.), pet. for cert. filed, U.S. No. 95-124 (July 21, 1995), hold at most that the government has a substantial interest in the effects of broadcast and cable programming on the welfare of children sufficient to permit it to require "channeling" of certain programming to times when unsupervised children are not likely to be in the

audience. It is a far different matter, however, to suggest that this general interest extends to permit the Commission to impose the broad speech requirements proposed here.[71]

Even if the Constitution permitted -- which it does not -- the sort of affirmative speech requirements that the Commission proposes if a compelling showing of need for such regulations were established, the Commission has conceded that such a showing has not been advanced in this proceeding. Professor Smolla points out that the Commission summarized its review of the materials submitted in response to the Notice of Inquiry and concluded:

> "[W]e find that this evidence is insufficient to support a conclusion as to whether or not the educational and informational needs of children are being met, including whether the CTA and our existing regulations have precipitated a significant increase in the amount of children's educational and informational programming carried by commercial broadcasters." Notice ¶ 17.

The evidence in the record thus fails to demonstrate conclusively that there has been any overall failure by commercial television stations to meet Congress' directives in the CTA. At most, the Commission is unsure. In Turner Broadcasting, the Court required the government to do more than simply "'posit the existence of the disease sought to be cured'" in order to uphold the limited intrusion into cable operators' speech rights at issue there. 114 S. Ct. at 2470, quoting Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). The Commission's own characterization of the evidence concerning children's programming, Smolla points out, "is thin ice for any administrative regulation; it comes no where near the quality of record evidence or

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[71] Chairman Hundt recently stated, arguing in support of the Commission's proposals, that "[t]he First Amendment was not intended to limit the capability of parents, adults or government to protect and raise children." Chairman Reed E. Hundt, "Long Live Frieda Hennock," Women in Government Relations (Aug. 24, 1995). While government certainly has a significant role in promoting the well-being of children, the Supreme Court has made clear that the government's views about what is best for children are less significant than the choices their parents make. See, e.g., Bowen v. American Hospital Association, 476 U.S. 610, 630-31 (1986)(parents have the right to make treatment decisions for handicapped infants); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school attendance regulation where it conflicted with parents' religious views).

administrative experience required of regulations that presume to constrict First Amendment freedoms." Statement at 24.

Much of the Commission's proposals, Professor Smolla suggests, are based on a view of the First Amendment that would permit government to "play an affirmative role in elevating public debate and discussion." Id. at 25. Although this theory of the First Amendment has received much scholarly attention, it has not been adopted in judicial interpretation. "[T]he Supreme Court has repeatedly said that the First Amendment protects the emotional content of speech as well as the cognitive, the entertaining as well as the informing." Id. at 26. The Commission has no authority, therefore, to trample on the speech rights of broadcasters in order to promote particular types of speech or societal results it wishes to promote.

Finally, Professor Smolla examines the legislative history of the CTA. The sponsors of the Act, he finds, repeatedly stated that they did *not* intend that the FCC impose rules requiring specific quantities of particular types of programming. The Supreme Court has made clear that, when an agency adopts rules that raise serious First Amendment concerns, the courts should not approve such rules in the absence of a clear Congressional mandate for that position. While it is always true that the courts will construe an agency's authorizing statute to avoid serious constitutional problems, that rule — Professor Smolla notes — is particularly applicable when a rule affects First Amendment freedoms. See National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979).

Given the repeated Congressional insistence that quantitative mandates were not intended under the CTA, the Commission cannot point to a clearly expressed Congressional mandate authorizing the rules it proposes. Further, Smolla points to the Commission's own prior interpretations of the CTA — as late as the Notice of Inquiry in this docket — which consistently reflected the view

that Congress intended to leave licensees with broad discretion as to the type and amount of programs that should be aired in fulfillment of the obligations imposed by the Act.

The stark absence of any Congressional endorsement of the path the Commission proposes to take also distinguishes these rules from cases such as Red Lion where the Supreme Court relied on evidence of Congressional approval of the Commission's action as strong support for its rules. Smolla concludes that, were the Commission to adopt the proposed programming rules, it, "standing alone, would be taking steps that Congress could have attempted but did not. . .. [T]he authorities cited above dictate that the Commission refrain from experimenting with the delicate constitutional balance unless Congress itself specifically requires such an incursion." Statement at 35.

Smolla concludes by recognizing that the goal of improving children's television is laudable. In many areas of our society, government is free to take steps to improve the quality of life. The regulation of speech, however, is different. There, even under the cases upholding some restrictions on the speech rights of broadcasters, the government does not have the power "to commandeer the speech rights of independent speakers, forcing them to produce messages the government deems socially desirable." Id. at 38.

Thus, the rules proposed by the Commission are fatally flawed. The Commission may take steps to encourage the creation and airing of more and better educational and informational programming for children. It may review, as the CTA provides, stations' programming efforts at renewal time. What the Commission cannot do and remain true to our core constitutional values is dictate the amount and kind of programming that stations must broadcast. Because the proposals in the Notice would do just that, they would violate the First Amendment. The Commission should therefore not adopt them.

VI. The Commission's Proposal To Monitor the State of Children's TV Provides the Incentive For Stations To Maintain or Increase the Level of Children's Educational and Informational Programming, Despite the Low Viewership and Profitability of These Shows.

NAB believes that the Commission should rely on the Act and the current rules as a sufficient and better stimulus to achieve the purposes of the Act. Given, as the Notice of Inquiry put it, statements of purpose over specific regulatory requirements,[72] licensees have the incentive, the responsibility and the discretion to consider various ways to serve their child audiences, rather than simply the necessity of following specific dictates as to amount and type of programming to present.

And it cannot be seriously doubted that quantified processing guidelines amount to specific required dictates, with the practical effect of mandatory programming rules. Licensees would be as constrained to program in strict accordance with the government's quantitative processing guidelines -- so as not place their licenses in jeopardy -- as they would be with mandatory rules. Their individual assessments, judgments and flexibility (all intended by Congress) would go out the window, replaced, most likely, by a numbers games. For, faced with the regulators' rules as to quantity (and perhaps type and time), the broadcaster's emphasis of necessity would be shifted to numbers of minutes rather than content. And the focus would be shifted away from what Congress intended to be service to children's educational and informational needs "through the licensee's overall programming, including programming specifically designed to serve such needs."[73]

Perhaps what the Notice characterizes as "uncertainty," and what the Congress intended as discretion and flexibility, will spur better and more educational and informational programming for children than would the security of "numbers."

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[72] See, Notice of Inquiry, supra note 2, at ¶ 5.

[73] The Act, § 103 (a) (2).

NAB believes that the Commission's continued emphasis, enforcement efforts and monitoring of the programming performance of licensees will provide sufficient incentive for each broadcaster to continue to take serious account of its service to children.

NAB would suggest that, if the Commission proposes to "monitor" educational and informational programming, that it similarly assess the educational and informational programming available to children on public broadcasting stations and on cable.

NAB also believes that we have seen with the significant increases in educational and informational children's shows that broadcasters will in fact air these shows, despite, as we have previously mentioned, the low viewership of most educational and informational programs.

VII. Conclusion.

NAB has here presented solid evidence of a significantly increased amount of children's educational and informational programming presented by commercial television stations, in all markets across the country, in response to and since the Children's Television Act. The Act and the Commission's emphasis on children's TV have provided the incentive for these increases and the unquantified nature of the obligation and, in fact, its uncertain nature serve to keep the broadcaster focused on its service to children -- in a way that a straight quantified obligation would not. NAB urges the Commission to continue the course set by the Congress and the Commission's current rules,

which is in fact fulfilling the Act's goal of increased educational and informational children's programming on broadcast television.

Respectfully submitted,

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October 16, 1995

THE 1990 CHILDREN'S TELEVISION ACT: A SECOND LOOK ON ITS IMPACT

Richard V. Ducey, Ph.D. and Mark R. Fratrik, Ph.D.

National Association of Broadcasters

October 16, 1995

EXECUTIVE SUMMARY

When Congress passed and the FCC later implemented the 1990 Children's Television Act, it was hoped the Act would lead to an increase in the amount of educational and informational programming on commercial broadcast television stations. Nearly five years after enactment of this legislation, and nearly four years after the FCC issued its implementing rules, we now have investigated twice whether broadcasters have fulfilled that expectation. The answer in both studies is a resounding yes.

Our first examination of whether broadcasters increased their airing of educational and informational children's programming was conducted last year and showed a substantial increase in the amount of this programming from Fall 1990 (before the Act's implementation) to Fall 1993. Some criticized that study suggesting that the response rate was insufficient to draw generalizable conclusions. In order to respond to these criticisms, we made a special effort to contact the previously non-responding stations and successfully encouraged them to respond to a new survey (overall response rate of nearly 60%). What we found was that the non-responding stations actually aired more educational and informational children's programming than the average reported in last year's study.

Some of the results from this year's survey are:

- The average commercial television station aired more than 3-3/4 hours (225.85 minutes) in Fall 1993 and over four hours (244.74 minutes) in Fall 1994 of regularly scheduled full length (30 minutes or more) educational and informational children's programs.
- Fall 1994 amount was over 100% higher than the Fall 1990 amount (122.02 minutes).
- Similar significant increases were also found in the airing of children's educational and informational specials (i.e., program length 30 minutes or more but not regularly scheduled).
- Stations in all market sizes showed strong increases from Fall 1990 through Fall 1994.
- All affiliate types (ABC, CBS, Fox, and NBC) and independents air substantially more children's educational and informational programming in Fall 1994 than in Fall 1990.
- For Fall 1994 over four fifths (81.4%) of the children's educational and informational programming started after 7:00 AM, with nearly another sixth (15.8%) starting between 6:00 AM and 7:00 AM.

INTRODUCTION

When Congress passed and the FCC later implemented the 1990 Children's Television Act, it was hoped the Act would lead to an increase in the amount of educational and informational programming on commercial broadcast television stations. With increased demand of these television stations for this genre of programming, it was also hoped that over time, producers and syndicators would produce more educational and informational programming. Nearly five years after enactment of this legislation, and nearly four years after the FCC issued its implementing rules, we can investigate, and report on the success of this legislation in increasing the amount of educational and informational programming made available on commercial broadcast television stations.

This present report adds to the analysis conducted last year, "The 1990 Children's Television Act: Its Impact On The Amount Of Educational And Informational Programming."[1] In the 1994 Report we showed that, in fact, there was a substantial increase in the amount of educational and informational children's programming, increasing 81 % from the Fall of 1990 to the Fall of 1993.[2] By Fall 1993 the average television station responding to the survey reported airing over 3 1/2 hours (220.81 minutes) of regularly scheduled children's educational and informational programming per week and an additional average 5.90 minutes per week of specials.[3]

This present reports adds data that were collected for Fall 1994 on the amount of children's educational and informational programming that was aired. Additional data for Fall 1993 were also collected. Some parties criticized the 1994 Report suggesting that the response rate of 31.1% was insufficient to draw generalizable conclusions. The FCC suggested in its notice that "[t]he stations that chose to respond to the NAB and INTV surveys may have made a more significant effort to provide educational programming than those that did not respond."[4] This

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[1] Richard V. Ducey, and Mark R. Fratrik, "The 1990 Children's Television Act: Its Impact On The Amount of Educational and Informational Programming," National Association of Broadcasters, Washington D.C., June 1994. (Hereafter refered to as the "1994 Report.")

[2] Ibid., p.3.

[3] Ibid.

[4] Federal Communication Commission, Notice of Proposed Rule Making, Polices and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations, MM Docket No. 93-48, para. 18, p. 11.

potential problem is what is referred to as a *non-response bias*, where the answers from the non-responders would be statistically different than those from the actual respondents.

In order to respond to these criticisms, we made a special effort to contact the previously non-responding stations. What we found was that indeed there was a small non-response bias. ***However, the bias was in the opposite direction, i.e., the non-responding stations actually aired more educational and informational children's programming.*** The average commercial television station aired more than 3-3/4 hours (225.85 minutes) in Fall 1993 and over four hours (244.74 minutes) in Fall 1994. The Fall 1994 amount was more than 100% higher than the Fall 1990 amount (122.02 minutes) which was prior to the passage an implementation of the 1990 Children's Television Act. Clearly, broadcasters have responded to the Act's passage and implementation with significant increases in educational and informational programming.

This report will first discuss the survey procedures, followed by the overall national results. Results by station type (ABC, CBS, Fox , NBC and independent) and also by market size are then discussed. Finally, the starting times of the regularly scheduled programming are examined. Appendix 1 includes the actual survey questionnaires sent to the television stations.

SURVEY METHODOLOGY

Two questionnaires were sent out to two groups of commercial television stations, and are included in Appendix 1. Stations that responded to the 1994 survey (278 stations) were faxed a questionnaire and asked to list all of their children's programming for Fall (October, November and December) 1994 that met the following definition for educational and informational children's programming:

> *Programming originally produced and broadcast for an audience of children 16 years old and younger which serves their cognitive/intellectual or social/emotional needs.*

Stations that did not respond to the 1994 survey, and with known fax numbers, were faxed an identical questionnaire but asked to list their children's programming under the same definition for both Fall 1993 and Fall 1994.

In addition to their regularly scheduled children's programs, stations were also asked to list all specials that met the definition. While shorter form (i.e., less than 30 minutes in length)